

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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:
SOKOLOW, et al., : 04-CV-397
:
Plaintiffs, : January 19, 2012
:
v. : 500 Pearl Street
: New York, New York
PALESTINE LIBERATION ORGANIZATION, :
et al., :
:
Defendants. :
-----X

TRANSCRIPT OF CIVIL CAUSE FOR CONFERENCE
BEFORE THE HONORABLE RONALD L. ELLIS
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

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1 THE CLERK: Parties on the docket, Sokolow, et al. v.
2 PLO.

3 Will all counsel please identify yourselves for the
4 record?

5 MR. TOLCHIN: Good morning, Your Honor. Robert
6 Tolchin the Berkman law office, 111 Livingston Street,
7 Brooklyn, for the plaintiffs.

8 THE COURT: Good morning.

9 MR. HILL: Good morning, Your Honor. Brian Hill from
10 Miller & Chevalier in Washington for the defendants, the
11 Palestinian Authority and the PLO.

12 THE COURT: Good morning. Okay. Well, I've
13 identified a number of issues based upon your submissions. You
14 may have other things that you have in mind, but I'll go
15 through what's on my list and then we'll see what's left over.

16 The first thing that's on my list is plaintiff's
17 motion for reconsideration regarding the Hague letters. At
18 least in my looking at what was submitted by the plaintiff as
19 to whether or not they were any facts that were overlooked by
20 the Court or mistakes of fact, the -- I gather the plaintiff
21 noted that we had referred to Ballal [Ph.] and Abdullah as
22 brothers are indicated that the plaintiff had said that they
23 were brothers and then there was some back and forth between
24 the parties about whether or not there was information or
25 evidence that they were brothers. Doesn't really matter to me.

1 It wasn't the basis for the decision, so if that's the -- if
2 that's the factual dispute, you may work it out sometime during
3 the case but it's not -- it's -- as far as the motion for
4 reconsideration under Rule 59, that's not a fact relied on by
5 the Court. And so it's truth or lack thereof is not going to
6 change the ruling. So we'll put that in writing and you can do
7 whatever it is that you want to do after that, Mr. Tolchin.

8 MR. TOLCHIN: Can I be heard for a moment on that,
9 Your Honor?

10 THE COURT: Excuse me?

11 MR. TOLCHIN: May I be heard for that -- on that
12 issue for a moment?

13 THE COURT: I thought you made your record already.
14 What do you want to say? I'll give you a minute. No more.

15 MR. TOLCHIN: Okay. The issue of whether they were
16 brothers was a red herring that came from defense counsel and
17 as I read Your Honor's honor it was a central issue of the
18 order that just because someone is a brother doesn't mean you
19 get to take his deposition.

20 We want to take his deposition because he's a witness
21 to material facts relevant to this case. We have a -- I can
22 run through it, if you like, but he was -- he was detained and
23 prevented of detention by the Palestinian Authority because he
24 and Abdullah Barghouti because of their past history of
25 organizing terrorist attacks and carrying them out he was

1 detained preventively to prevent him from doing that. And then
2 despite the fact that these people were known bomb makers and
3 terrorists they were released into the personal custody of
4 Marwin Barghouti who was a high-level officer of the
5 Palestinian Authority, who instead of doing anything whatsoever
6 to inhibit them from carrying out terrorist attacks gave them
7 an apartment and money enabling them, aiding -- giving them aid
8 and support. One of them then went on and did the Hebrew
9 University bombing, which is at issue in this case. But Ballal
10 Barghouti is a fact witness to the preventive detention, to
11 their release, to the terms of their release, how it came to be
12 that these known terrorists who had already carried out
13 terrorist attacks and had blood on their hands were -- came to
14 be detained preventively and then released. And Marwin
15 Barghouti furnishing them an apartment and money. And all of
16 those things if established establish the plaintiff's theory of
17 liability in this case.

18 Given those facts and given Ballal Barghouti's
19 knowledge of those facts I can't understand Your Honor's ruling
20 in the slightest as to why Ballal Barghouti is not a proper
21 witness to depose.

22 THE COURT: Okay. You've made your record, thank
23 you. All right. The next thing is the plaintiff's motion to
24 strike or with respect to the letter in opposition that the
25 defendants filed. And this is a -- in regard to your motion to

1 compel the BBC and I'm not sure for the actual basis for the
2 motion to strike or the particular need to strike it because
3 this is not a case in which there is not a proper party raising
4 the opposition. I mean, in some cases all I have is a
5 plaintiff and a defendant and there's a third-party deposition
6 and one or the other seeks to raise it. And there can be
7 question about whether or not one of the parties has a standing
8 to raise an opposition to the subpoena. But the BBC is here,
9 so I -- regardless of what it is that the defendants want to
10 say I don't see any need for judicial intervention to strike or
11 not to strike.

12 So as to the BBC's argument we can take that that up
13 but all of your back and forth on whether or not -- or what was
14 said in the letter and what shouldn't have been said in the
15 letter I don't see a need for Court action with regard to
16 striking stuff that's in -- that's been sent or otherwise
17 communicated to the Court. I suppose if anything that the
18 defendant says gets considered by the Court then there might be
19 some issue, but I think the BBC has defended itself
20 sufficiently so that notwithstanding the help offered by Mr.
21 Hill I think the issue has been joined.

22 Now, with respect to the BBC, Mr. Tolchin, I'm -- I
23 would like for you to articulate for me specifically what claim
24 that you have and the tie-in to this BBC documentary and what
25 it is that you want from the documentary and how that would be

1 factual information in the documentary that would be of
2 assistance in the claim.

3 MR. TOLCHIN: I apologize to the Court because I
4 didn't realize that this motion was being argued today and I
5 don't have those papers with me to look it over, but generally
6 speaking the BBC documentary aired a part of an interview and
7 the part of the interview contains statements that are helpful
8 and informative to a certain extent, but it was a part of a
9 longer interview. Anybody who's been interviewed by a news
10 show knows that they come and interview you for an hour and
11 then use a short portion of it as part of a show. So since
12 there was this recording we would like to see all the
13 statements. There's always the claim that the statement that
14 was aired was taken out of context, it didn't show the whole
15 point.

16 THE COURT: Give me the nub of the statement. How
17 does the statement relate to your claim and how it suggests
18 that there is more that was on the cutting room floor.

19 MR. TOLCHIN: Well, we know there's more.

20 THE COURT: Well --

21 MR. TOLCHIN: We know there's more because we asked
22 BBC for it and they didn't say we don't have any. They --

23 THE COURT: Well, we --

24 MR. TOLCHIN: -- said "We're not giving it to you."

25 THE COURT: Okay. Just to be clear, we know that

1 they didn't air every inch of footage they shot. My question
2 really is, how do we know there's anything relevant on the
3 cutting room floor. What are indications from --

4 MR. TOLCHIN: We don't. We don't, but we also know
5 that we're here about discovery, which is not only governed by
6 irrelevance but what may lead to relevant information.

7 THE COURT: And that's my question. What is it about
8 what was said about what you know that indicates that what's on
9 the cutting room floor might be relevant? I mean, as well as
10 it could be, I mean, is there anything that would indicate that
11 there's relevant information that didn't --

12 MR. TOLCHIN: Until I've seen the material I can't
13 speak to that. If that is what is concerning Your Honor,
14 perhaps viewing it in camera might be an option and then, you
15 know, if Your Honor is concerned that we may be seeking to
16 obtain discovery of materials that might not be relevant or
17 might not lead to relevant information, then perhaps that might
18 be a method to address that. I can't speak to what it contains
19 not having seen it. If BBC's counsel were here -- and they're
20 the moving party and frankly, it's a -- I do have some concerns
21 about addressing their motion when they're not here. But, you
22 know, perhaps their counsel has seen it and can speak to that,
23 but --

24 THE COURT: Okay. But what I'm -- what I'm concerned
25 about is this. And this is not just about the BBC, but

1 anything that airs on any station what principles should I use
2 in order to determine whether or not if you -- you view -- you
3 know, they have a documentary on Trump and some of it doesn't
4 make the cutting room floor and somebody is suing Donald Trump
5 and they say, well, Donald Trump might have said something in
6 the interview that might be relevant to my case. I can't see
7 me saying, well, he might have but, I mean, what the courts
8 look for are some kind of guidepost to say if you have A, B,
9 and C that's an indication that you go further.

10 But as far as -- you -- the principle certainly can't
11 be because that, you know, this person is in the same general
12 area and it must be that they -- it's possible that they may
13 have said something.

14 MR. TOLCHIN: I want to be perfectly clear, Your
15 Honor. I was not aware that today we were going to be arguing
16 this motion. It's not noticed for argument; BBC's counsel is
17 not here. I don't have the papers in front of me. The
18 statements of the -- the statements contained in the portion
19 that was aired, which I can't quote or discuss in detail for
20 the reasons I've just told you, they are relevant to our case.
21 That's why we're seeking the rest of the interview. Okay.
22 Beyond that, I don't think it's fair to proceed to discuss at
23 this time.

24 THE COURT: Well, it certainly wouldn't be fair to
25 the BBC, but if I were to base my decision just on any

1 questions I asked you, but I'm just looking for some kind of
2 entre into my analysis. Obviously I'll take into account the
3 arguments that the parties have, but I'm looking for a
4 framework in order to determine if in a situation such as this
5 how should the Court go about doing it and --

6 MR. TOLCHIN: Well, Your Honor's example with Donald
7 Trump if you have, you know, Donald Trump said in an interview,
8 "You know, I always cheat my contractors. Whenever they send
9 me a bill I don't pay them for six months and then I tell them
10 I'm going to pay them 80 cents on the dollar, that's how come I
11 got to be a gazillionaire," and now you have a case involved
12 with the contractor. And he says, "Hey, I want to see what
13 else Donald Trump said," you know.

14 THE COURT: Okay. And you're saying that the
15 statements as you described them in your papers are of that
16 ilk?

17 MR. TOLCHIN: Of that ilk. And I had that case once
18 against Donald Trump.

19 THE COURT: Okay. All right. Well, I figured as
20 long as I have somebody in front of me it's always a good time
21 to see what more I can get from them. The rest of what I have
22 has to do with defendant's complaints about their discovery
23 response to Mr. Tolchin. And let me begin with the
24 interrogatories. Okay. And I looked at your responses to the
25 interrogatories and I can't help but wonder whether or not you

1 thought that these answers were in the spirit of the rules.

2 MR. TOLCHIN: You can't help but wonder? I'm sorry,
3 Your Honor.

4 THE COURT: Whether or not you think that the answers
5 that you provided to the interrogatories were in the spirit of
6 the rules.

7 MR. TOLCHIN: I think they were in the spirit of the
8 rules with the huge underlined caveat that these were some
9 really god-awful questions. There -- these are not focused
10 interrogatories in the slightest. They're asking us for
11 everyone who knows about something or whom we believe may know
12 about something.

13 THE COURT: Okay. But I was under the impression at
14 the last time we were here in our discussions it was clear you
15 were looking for people that you knew about as opposed to, you
16 know, speculation about other people. And certainly it did
17 not -- it did not contemplate that you would be naming official
18 of the United States, since you're not in privity to them.

19 MR. TOLCHIN: But that's not so. I mean, we're not
20 in privity with the United States, but we know for a fact --
21 for example, we talked about the Barghoutis and why -- and how
22 they were put in preventive detention. We know from the news
23 reports that the reason they were put in preventive detention
24 is because the Palestinian Authority was receiving intense
25 pressure from the United States Government to do something

1 about the string of bombings that was taking place every day in
2 Israel.

3 So there were people -- we know there were people in
4 the United States Government who investigated --

5 THE COURT: Okay. All right.

6 MR. TOLCHIN: -- these things and had information
7 about it.

8 THE COURT: Perhaps we're not communicating. All
9 right. I'll put that on me if we're not communicating. My
10 preface to this was we're looking for things that the
11 defendants can get from you, not general knowledge. I mean,
12 the idea that officially the United States knows stuff is not
13 information that the defendants need to get from you; they want
14 to know information that you have. And if you start naming
15 people that -- I mean, I could have put these answers down.
16 He -- and what would be the point of that?

17 MR. TOLCHIN: But here's the bind word. Here's the
18 bind word. If we -- given the broad question they asked, if we
19 did not give our broad answer as we gave it and then later we
20 found an official in the United States Government who was
21 prepared to come and testify about what the Government knew,
22 they'd say, sorry, you didn't identify him in response to your
23 interrogatory answer. You only said 1, 2, 3, 4, 5 people. You
24 didn't mention him and you didn't mention the Government.

25 THE COURT: Okay. I'm sorry. Before you continue,

1 let's be clear. All right. That they can say almost anything
2 but you have to assume that there's a court officer who's
3 making reasonable decisions. If he asked you a question about
4 who knows and you know about a United States official, you name
5 that person. If you don't know about him and don't name him,
6 he doesn't have any quarrel. And if he comes in and says, you
7 didn't name this person, and you say you just found out about
8 him yesterday, I don't care what he says. You can only give
9 the information you know at the time that the question is
10 asked. So he cannot under the rules complain if you find out
11 about somebody later on.

12 MR. TOLCHIN: If that's Your Honor's ruling --

13 THE COURT: That's --

14 MR. TOLCHIN: -- and if that ruling is binding on the
15 trial judge in the appeals court, that will say that we
16 didn't -- I'm prepared to live with that. But we also -- until
17 Your Honor makes that ruling and that directive and limits his
18 question in that way and narrows --

19 THE COURT: Okay.

20 MR. TOLCHIN: -- the response in that way --

21 THE COURT: All right. Mist --

22 MR. TOLCHIN: -- we have to give a broad answer to a
23 broad question.

24 THE COURT: Mr. Tolchin, I don't know where -- I
25 don't know any judge who'd take the position that if you don't

1 know an answer you are required to give a name.

2 MR. TOLCHIN: No, we don't know a name for sure but
3 we know, for example, that there were officers of the
4 defendants who were unknown to us but they exist.

5 THE COURT: And, you know, the requirement that asks
6 that you give information -- and I see these questions in
7 cases -- you know, it's only things that under -- under the --
8 that you have under your knowledge and specific knowledge. I
9 mean, it -- you know, assuming that you had a question in which
10 everybody in this court knew that an United States official was
11 involved and they asked you a question that's here in the
12 interrogatories and you didn't say United States official, I'm
13 having trouble with the idea that you think that somehow that
14 if you found out the name of that person later on some court is
15 going to say, well, you didn't name that person.

16 MR. TOLCHIN: Judge, I have been --

17 THE COURT: You --

18 MR. TOLCHIN: -- burned more times than I care to
19 count by making assumptions that people will be reasonable
20 later, so when we give an answer -- when there's a really broad
21 question that somebody might come later and say, hey, we asked
22 this really broad question and you didn't tell us what you knew
23 at the time and granted, you didn't know the guy's name but you
24 knew that somebody in the Government or some official of some
25 organization and you didn't tell us that you thought there was

1 a government official, that can -- we -- my clients can get
2 harmed by that.

3 THE COURT: Okay.

4 MR. TOLCHIN: By the potential --

5 THE COURT: Now --

6 MR. TOLCHIN: -- for somebody to interpret the
7 question broadly.

8 THE COURT: I have two choices here, Mr. Tolchin.
9 And we can move on or I can challenge you to show me a judge
10 that's done that because any judge that's done that I don't see
11 how they function because -- I don't see how any party can be
12 asking for information that's not within their knowledge. And,
13 you know, this generalization that they are an official of the
14 United States, I don't see it. And, okay, let's move on. All
15 right.

16 If you want my ruling then these generalizations
17 about official of the United States, members of the media, all
18 that stuff to me that's not -- first of all, I'm not sure that
19 the word "knowledge" even applies to anything that you say
20 there because you don't know anybody.

21 MR. TOLCHIN: What this response means is upon
22 information and belief plaintiff believes there are officials
23 in the U.S. Government who may have knowledge. That's all it
24 means. It's --

25 THE COURT: Okay. And does that mean that this is --

1 I'm more concerned, Mr. Tolchin, so you understand, if you give
2 all these broad answers about the United States and whatever
3 because you think you need to cover yourself.

4 MR. TOLCHIN: Um-hum.

5 THE COURT: -- I want to see if after that then you
6 say, okay, all right, in addition to all these broad topics of
7 people who -- on information believe, in addition to that,
8 okay, there is Joe, Frank, Tom, and Larry, because it's not
9 unusual for somebody to answer a question and give a broad
10 answer and it the part -- and notwithstanding our broad answer
11 these specific answers, I don't see that you've done the latter
12 part.

13 MR. TOLCHIN: Well, the first -- the first broad
14 answer is kind of in a category by itself because we said
15 officials of the defendant. Now they know -- I don't have
16 access to them, but they know who they are.

17 THE COURT: Okay. So you're saying --

18 MR. TOLCHIN: Yeah.

19 THE COURT: -- I mean, you're assuming that the
20 defendants know what the defendants are doing.

21 MR. TOLCHIN: Correct.

22 THE COURT: I mean, if --

23 MR. TOLCHIN: We took the deposition of the son of
24 Hamas, you know, the --

25 THE COURT: I understand, but Mr. Tolchin, look. We

1 could do this dance all morning but, you know, your answer is,
2 you know, the plaintiff gets asked who knows about
3 discrimination and the deficiency says official, and the
4 plaintiff says --

5 MR. TOLCHIN: The management of the company.

6 THE COURT: -- officials of the defendant know about
7 the discrimination and nobody thinks that's going to advance
8 the cause, I mean --

9 MR. TOLCHIN: Well, I would agree with you completely
10 that by identifying the person that way that's not enough to
11 call them to trial yet. When we find out who -- which
12 official, which officer, which vice president failed to
13 implement the nondiscrimination policy or whatever, obviously
14 we have to supplement it and --

15 THE COURT: But you agree that if I get those kinds
16 of answers on a discrimination case it -- the defendant
17 wouldn't have really any information. He's, I mean --

18 MR. TOLCHIN: Well --

19 THE COURT: I mean you can take any case, any kind of
20 topic and what your case -- what your responses amount to is
21 the other side saying, people on your side know the story, I
22 don't have to do it, and I don't -- I don't see the efficacy of
23 that.

24 MR. TOLCHIN: It's not that I don't have to do it,

1 it's just that I don't know who they are. I have no way to
2 know who they are. I know what your client did, I know the
3 actions taken by the organization but --

4 THE COURT: Right, but what's the point of even
5 making that generalization?

6 MR. TOLCHIN: Well, it --

7 THE COURT: Be --

8 MR. TOLCHIN: I would argue what -- what's the point
9 of asking such a broad question. People who you believe may
10 have knowledge: that's not really a helpful question.

11 THE COURT: Well, okay. But --

12 MR. TOLCHIN: That's not even a question that would
13 be allowed to in court.

14 THE COURT: Mr. Tolchin, look I've had people answer
15 questions like that and they always assume that it's -- they're
16 looking for people that you know, not people that he knows. I
17 mean, what could happen, for example, is you could answer a
18 question like that and you might think, for example, that the
19 mail deliverer knows something because he happened to be there
20 when certain things were said, but you don't know that he knows
21 it. But they don't want to know the -- you know, just some
22 broad statement. But even if that's so, in addition to that
23 did you do any identification of anybody beyond the broad
24 pronouncements? I don't see where you did that.

1 MR. TOLCHIN: We -- We did not. We have --

2 MR. HILL: Your Honor, just so the record is clear,
3 two individuals are named by name in the seven sets of
4 responses I have received. Two.

5 THE COURT: Okay. And just to be clear, I think
6 there's a more serious issue here in terms of you talking about
7 being precluded, if you're saying that the only people that you
8 know are the two people that you've responded to Mr. Hill --

9 MR. TOLCHIN: At this time.

10 THE COURT: -- then if you come up with any more
11 names, at least for me, you're going to have to show that
12 you -- how you just came up with the names. You understand
13 what I mean?

14 MR. TOLCHIN: But you mean if I -- if I discover a
15 new name tomorrow Your Honor would want to see that I learned
16 it tomorrow and I didn't know it yesterday.

17 THE COURT: That's correct.

18 MR. TOLCHIN: I agree with you.

19 THE COURT: Okay. As I said, putting aside the dance
20 and basically what you're telling Mr. Hill is, as of today the
21 only people that you know that are responsive to the
22 interrogatories are the two names that you gave.

23 MR. TOLCHIN: Hundred percent.

24 MR. HILL: Well, if that's the case, Your Honor, I

1 would just ask that you memorialize this in an order that no
2 witnesses will be -- the plaintiffs will not be allowed to use
3 any witnesses that would have been responsive to any of these
4 interrogatories other than the two persons that have been
5 identified by name which, for the record, are Abdullah
6 Barghouti, who you've heard a lot about and a gentleman named
7 Mohammed Doan [Ph.].

8 THE COURT: I don't do that. I mean, the rules are
9 what the rules -- if he doesn't identify somebody, if he comes
10 up with somebody later on we'll consider it then.

11 MR. HILL: Right. Well, the reason I do this is
12 because I have categories of Mr. Tolchin's letter that says
13 hundreds of names. Actually it's probably hundreds of
14 thousands of names including every employee of the U.S.
15 Government from my mailman to Your Honor to President Obama. I
16 don't want to later be confronted with a witness in an
17 affidavit or a trial and then have the plaintiffs argue that,
18 oh, well, he's one of the defendants or he's one of the
19 plaintiffs and therefore he can testify about this as an
20 employee of the U.S. Government, therefore he can testify about
21 this.

22 THE COURT: Okay. All right. I'll be clear to both
23 of you. All right. All the general names, all the general
24 things that Mr. Tolchin did, it doesn't get any names, okay.
25 If he comes -- if he were to come here tomorrow with somebody

1 who is an official of the United States and said, this is a
2 witness, the answers to interrogatories won't get him there.
3 He's got to indicate why he's just identified that person, and
4 if he could have identified him before then he's not going to
5 be able to use that at least from my discovery. He could -- he
6 could make an issue with somebody else but --

7 MR. TOLCHIN: Your Honor, I want to qualify this
8 because there's the issue of, you know, employees of the United
9 States Government. That we discussed at length, but the
10 response that we gave also refers to the persons mentioned in
11 the complaint. We referred to it that way, we referred to the
12 complaint and said all persons mentioned in the complaint and
13 the amended complaint.

14 THE COURT: What do you mean all persons mentioned in
15 the --

16 MR. TOLCHIN: There's persons who -- there's persons
17 who are named in the complaint. For example, take a look at --
18 if we just look at their -- at the questions they ask that
19 these are responses to, just taking at random interrogatory
20 number eight that was "Identify all persons who you know have
21 knowledge or who you believe may have knowledge that" -- and
22 they're quoting the complaint, "defendants PLO and PA aided and
23 abetted Ahmed Barghouti, Nasser Aweis, Hamas Al-Titi, Mosalla
24 Rahman, Abdullah Ramadan, and the John Doe defendants to carry
25 out the 12/22/02 shooting."

1 So all those people are identified in the complaint.
2 All those people are named in their question, and we said in
3 our answer all the people we named in the complaint are
4 witnesses. So by -- we certainly are not meaning to limit
5 ourselves to exclude the people who are named in the complaint,
6 but the --

7 THE COURT: Okay. All right. What do you want to
8 say, Mr. Hill?

9 MR. HILL: Here's the problem, Your Honor. I've
10 counted seven sets of interrogatories, each one is ten or 11
11 interrogatories long and they go to specific factual
12 allegations made in the complaint. I mean, just to pick one
13 example, this is interrogatory number one from the
14 interrogatories directed to the Gould and Waldman plaintiffs.
15 "Identify all the person who you know have knowledge or who you
16 believe may have knowledge that the defendants provided Ramadan
17 with an M16 machine gun for the specific purpose of murdering
18 and injuring an innocent passerby on the January 22, 2002
19 shooting as alleged in paragraph 70 of the first amended
20 complaint."

21 The local rule says that to identify when referring
22 to a person needs to give to the extent the person's full name,
23 present or last address. Okay. I got a response that it's the
24 same for all of them which says plaintiffs, defendants, the
25 United States, everybody named in a document in the case,

1 everybody named in the complaint, everybody identified in an
2 interrogatory. That doesn't tell me who knows about the
3 defendants giving the gun to Ramadan, which is the subject of
4 interrogatory number one. I propounded this interrogatory
5 because I wanted to know which witnesses the plaintiffs believe
6 have this knowledge. Their answers don't inform me of that,
7 and I'm asking Your Honor to rule that unless they inform me
8 that -- Ramadan, for example, knows about us, I don't know if
9 they believe in those or not. Somebody is supposed to know,
10 and at this point I can't take any discovery to discover who
11 knows this fact based on these answers. That's why they're
12 non-answers, that's why they violate the court's order.

13 MR. TOLCHIN: Your Honor, I would submit that what
14 Mr. Hill just said just shows the gamesmanship that's going on.
15 He seriously is arguing that he doesn't -- that he doesn't know
16 if Ramadan knows who gave him a gun?

17 MR. HILL: I think Ramadan --

18 MR. TOLCHIN: Even Ramadan himself wouldn't know,
19 he's saying?

20 THE COURT: Okay. With that -- okay. That's
21 latching onto the last part of what he said, but I understood
22 the point he was trying to make about using Ramadan as an
23 example that you didn't list him specific as somebody with
24 knowledge about the gun, but I -- but the defendant is correct

1 in this regard. To the extent that he asked interrogatories
2 that require you to give specific answers, you can't just paint
3 with a broad brush and say all the defendants, any more than
4 again if we're talking about a contract case or an employment
5 case that you could say if you asked who was -- who knows about
6 the alleged discriminatory statement, you can't just say --

7 MR. TOLCHIN: I'd agree with you if his question were
8 identify any individual whom you know to have knowledge about
9 this fact. But once he gives this catch-all, everyone you
10 believe may have knowledge, that's so open-ended that I'm
11 compelled to list everybody. I -- he may have knowledge?

12 THE COURT: If you believe that you're compelled, we
13 have a disagreement. I think that at the very least when
14 you're dealing with questions in a -- in a discovery context
15 you have to give more guidance than to say because the
16 question -- because it's possible that anybody might know, I'm
17 going to list everybody. Your obligation under discovery is to
18 point the defendant in the direction of the people you believe
19 have knowledge, and just because they say who you think may
20 have knowledge doesn't mean that you get to throw everybody
21 else into the stew. And if this is the best you could come up
22 with that you want to name everybody, I do not find that you
23 have answered the questions in the manner and in the spirit in
24 which the rules require it. So to the extent that you may come
25 up with somebody later on who on that particular question was

1 about the providing of the weapon --

2 MR. HILL: Are you saying, Your Honor, that we should
3 notwithstanding the way -- the broad way the questions read but
4 based on Your Honor's ruling we should answer it more the I --
5 the alternative way, saying everyone who you know to have
6 knowledge about these facts, never mind that they said believe
7 may have knowledge.

8 THE COURT: Okay. All right. Now see, this is --
9 this is --

10 MR. TOLCHIN: Because if that's what you're saying,
11 I'll try to meet you on that.

12 THE COURT: Okay. I understand -- I understand, Mr.
13 Tolchin. This is where -- I'm trying to avoid the games
14 playing, okay. All right. You're accusing the defendant of
15 that but if you limit it specifically to the word "no" you're
16 not in the spirit of the question because it's not just no in
17 the sense that one has absolute knowledge of something and it's
18 not speculation either; it's people that you reasonably believe
19 can have information that's going to be helpful to the
20 defendant. And you may not know because who knows, I mean --
21 but you have to -- you at least have to reasonably point him in
22 the direction of people that you reasonably believe have the
23 information, not just anybody who speculatively might have the
24 information. So it's somewhere between absolute knowledge and
25 it could be anybody else in the world. But it's not going to

1 be no, because from a philosophical point of view, I mean, a
2 lawyer could -- a lawyer could dance on the head of a pin with
3 that one. I mean, because the reality is, what do we know, but
4 if you have some information and if you did a complaint you
5 presumably have somebody who's pointed you in the direction
6 that this is a factual assertion that has some legs --

7 MR. TOLCHIN: We have a source for everything that's
8 alleged --

9 THE COURT: Then you need --

10 MR. TOLCHIN: -- whether it's a person or a new
11 reporter or an article.

12 THE COURT: Then you need to -- you need to point
13 him in the direction of somebody who -- and if you're really
14 concerned about that you should do what some other people do,
15 notwithstanding the answer that we gave the -- we reserve the
16 right to -- and then describe whatever it is that you want to
17 put in, but you at least you could give the defendant the
18 people that you really believe have the information.

19 MR. TOLCHIN: Your Honor, I'm prepared to redo the
20 responses in keeping with Your Honor's rulings today and see if
21 we can improve things.

22 THE COURT: Well, it's either you're prepared to do
23 it or we're -- you're going be stuck with answers that aren't
24 going to get you very far.

1 MR. TOLCHIN: I understand that.

2 THE COURT: Okay. Is there any question that you
3 understand what I'm asking you to do?

4 MR. TOLCHIN: No. I think I understand, Your Honor.

5 THE COURT: Okay. And you understand when I say,
6 no, it involves something more than saying with absolute
7 knowledge, but --

8 MR. TOLCHIN: I understand that.

9 THE COURT: -- you know, because the reality is, --

10 MR. TOLCHIN: I hear you.

11 THE COURT: -- I'm not sure any of us knows anything
12 about any of these in the sense that scienter means that you,
13 you know, you have knowledge without reservation. But, you
14 know, as human beings we do a lot of things in which we don't
15 have 100 percent knowledge, but we have enough knowledge to
16 believe that we can act on the information.

17 So if you believe that the information, the fact that
18 you've submitted to Mr. Hill and his client have substance,
19 then you need to provide the person who's -- if it's a person,
20 the person who's provided that substance. And if there's
21 some -- it may be that official of the United States might know
22 that because they've talked to that person. I don't know, but
23 that's possible but that's not what they're looking for. It's
24 certainly not what I'd be looking for. Two weeks.

1 MR. TOLCHIN: I think I need a little more time for
2 that, Your Honor.

3 THE COURT: Why would you need more time, Mr.
4 Tolchin?

5 MR. TOLCHIN: Because there's a lot of -- there's a
6 lot of details to this and I have a lot of other things also.

7 THE COURT: I mean, am I to understand that with
8 respect to these questions, now broad as they may be, you're --
9 are you representing to me that in those -- in your responses
10 and in preparing the answers, and even though you were cautious
11 to put in these broad descriptions you never got to the point
12 of looking at the specific individuals that might be responsive
13 to these?

14 MR. TOLCHIN: I'm not saying that but, you see, when
15 we referred -- in our response we referred to all people
16 identified in documents that have been produced, all people
17 named in the complaint, and that's a large body. And I wanted
18 -- since we're going to be stuck with it, I want to be --
19 make sure that I have enough time to go through it carefully
20 and hit everything. And it's not holding --

21 THE COURT: So how much time --

22 MR. TOLCHIN: -- it's also not holding anything else
23 up right now.

24 THE COURT: How much time are you asking for, Mr.

1 Tolchin?

2 MR. TOLCHIN: Thirty days.

3 THE COURT: I mean, this -- you know, this is a 2004
4 case we're talking about.

5 MR. TOLCHIN: Right, but it's only been -- discovery
6 has only been going on for a much shorter period of time
7 though.

8 MR. HILL: Your Honor --

9 MR. TOLCHIN: There's motion practice pending for
10 years.

11 MR. HILL: Discovery has been going on for seven
12 months, discovery closes in 11 months.

13 MR. TOLCHIN: Right, but --

14 MR. HILL: I served these interrogatories at the end
15 of August.

16 MR. TOLCHIN: But that has nothing to do with 2004.

17 MR. HILL: And as a result of that I have two names
18 of people that are allegedly percipient witnesses.

19 MR. TOLCHIN: Okay. They're --

20 THE COURT: All right. Here -- I will give you
21 three weeks. You got an extra week out of it, don't --

22 MR. TOLCHIN: I should have asked for six weeks.

23 THE COURT: Well, you probably still would have only
24 gotten three. The fact is, I think that you should have had

1 this information when you were preparing the answers the last
2 time. I'm -- I won't say I'm shocked that you didn't, but I
3 don't see how you could have -- even if you thought that the
4 broad answers were appropriate for caution sake, why you would
5 not have at least -- under the spirit of the rules at least
6 identified specific individuals who would have had the
7 knowledge. And frankly, three weeks is more time than I think
8 you should get given the circumstances.

9 MR. TOLCHIN: What date is that?

10 THE COURT: It is January 19th -- okay. February
11 9th.

12 MR. HILL: Your Honor, while we're on this topic of
13 orders and lack of compliance --

14 MR. TOLCHIN: I thought we were on the topic of the
15 interrogatories.

16 MR. HILL: -- on Tuesday I received from Mr. Tolchin
17 what purport to be supplemental damages disclosures which
18 purport to be responsive to the order you entered on December
19 9th, requiring calculations of damages -- for economic damages.
20 Would I be able to ask for the court's intervention on this
21 issue as well because I don't have any economic damages
22 calculations notwithstanding the fact that you ordered them
23 twice and I have a copy to show Your Honor.

24 MR. TOLCHIN: I disagree with the characterization,

1 but --

2 THE COURT: All right. Send it to me. As much as
3 it's a joy to have the two of you here I do have other things
4 scheduled, but I gather that you don't have --

5 MR. HILL: I have no calculations at all.

6 THE COURT: Okay.

7 MR. HILL: Should I be -- should I file a motion for
8 sanctions at this point or would the Court like me to send you
9 another letter?

10 MR. TOLCHIN: There's no basis for --

11 MR. HILL: Well, I mean, but --

12 MR. TOLCHIN: It --

13 THE COURT: Send it to me and we'll look at it and
14 then we'll probably do is we'll get the two of you on the phone
15 and see if we can hatch it out, but I want to look at it first
16 and I don't to be looking at it while we --

17 MR. HILL: That's perfectly fair for Your Honor. I
18 guess the other issue is the letter pertaining to the document
19 request.

20 MR. TOLCHIN: I believe Your Honor said that you had
21 I think five issues that you wanted to address.

22 THE COURT: I think in our discussions we've come up
23 with those issues. The last thing was the document request.
24 This is with respect to Mr. Youseff [Ph.].

1 MR. TOLCHIN: Correct.

2 THE COURT: What kind of documents are we talking
3 about?

4 MR. HILL: Well, Your Honor, as we related in our
5 letter, this gentleman as you know was subpoenaed for a
6 deposition to happen on the Monday after Thanksgiving. We
7 served document request. We asked the plaintiffs to shorten
8 their response time so we could get any documents the
9 plaintiffs had in advance of the deposition. The witnesses,
10 you know, didn't show up on the 28th of November but did agree
11 to come testify at Mr. Tolchin's office on January the 10th. I
12 was at his deposition. And while we were there the witness
13 told us that he had been previously engaged by one of the
14 plaintiffs' Israeli lawyer, who an expert witness; that that
15 lawyer had given him documents which he had reviewed; that he
16 had written a report and sent it to that Israeli lawyer who
17 represents the plaintiffs; and that the plaintiffs' lawyer had
18 paid him between \$7,000.00 and \$10,000.00. And when we got
19 that information from the witness I reached out to Mr. Tolchin
20 via email and said, "Did you ever serve responses to our
21 document request? Did you ever produce these documents?"
22 Excuse me. "The document request clearly called for them.
23 They called for any communications between Mr. Youseff and you,
24 as that term is defined, which includes the plaintiffs'
25 lawyers."

1 THE COURT: So is it that basically you want the
2 documents that was sent to him and --

3 MR. HILL: The records of payment, the documents he
4 reviewed, the draft report he sent them.

5 THE COURT: And, Mr. Tolchin, at one point I believe
6 you said that there were no such documents.

7 MR. TOLCHIN: And I still stay that. I still say
8 that.

9 THE COURT: So --

10 MR. TOLCHIN: And Mr. Hill asked us when the -- the
11 first time that deposition was noticed, he asked us informally
12 could we accelerate responding to his response, not wait the 30
13 days that we had, and we did. We responded to him right way
14 and told him there's no documents. He doesn't like the form of
15 the response. He wants me to write it out with a caption and
16 write "there's no documents" and then say "yours," et cetera,
17 and sign it and put a certificate of service, but I'm telling
18 him right here, there's no documents. The witness identified
19 that he had been retained as an expert in a completely
20 different case that happened to involve the same attorneys, not
21 only on our side but on his side, too. Mr. Hill was the
22 defense counsel in that case and the -- there wasn't an expert
23 report written out by the expert, it's a thing they have in
24 Florida called an expert summary. It's written out by the
25 lawyer similar to 3101(d) in New York where you say this is --

1 my expert is expected to testify to, that was served. The
2 defendants have it. There was all sorts of motion practice
3 about it. In fact it was ultimately stricken in that case. So
4 Mr. Hill was well aware of it.

5 And that -- that is a document that arguably is in
6 possession of one of plaintiffs' attorneys in a different case
7 in the file of a different client. And we've cited in our
8 letter cases that say just because I'm an attorney representing
9 a client in this case doesn't give the defendant in this case
10 the right to force me to go look in my other clients' files or
11 my personal files. Where would that end? Can ask me for my
12 personal documents? If I'm representing people in this case
13 because they happen to be a student of world history, going to
14 ask me for my personal notes that I took when I attended a
15 lecture once? No.

16 THE COURT: Okay. Just to be clear, actually the
17 question of -- if you say you don't have documents, I do
18 require parties to do a certification if they don't have
19 documents by the parties.

20 MR. TOLCHIN: Parties, parties. What he's -- what
21 he's trying to get, he wants me to go to my client's Israeli
22 attorney and say to the Israeli attorney, go into the file that
23 you have from some other case and get documents.

24 THE COURT: And, Mr. Hill, what --

25 MR. HILL: Yeah. Well, here's the problem, Judge.

1 We had a deposition of the witness that they supposedly didn't
2 know how to contact that they characterized as a resistant
3 witness. We get there and we find out that the same lawyers
4 that are representing the plaintiffs in this case have paid
5 between seven and ten grand. That's information that I think I
6 should have gotten before the deposition and it's shocking to
7 me that it's now being argued that they could with a straight
8 face tell me they didn't have any documents that responded to
9 my request which clearly called for any communications between
10 the plaintiffs' lawyers and this witness. They told me they
11 had nothing other than the book. I don't believe that's true.
12 I never even got the Rule 34 response that the Rule requires
13 that says I don't have any documents.

14 And so the notion that because it was in a different
15 case therefore they didn't even have to object to providing it
16 and they can now be excused with the witness showing up and
17 saying, oh, by the way, I did have all these communications
18 with the plaintiffs' lawyers and they did pay me money and I
19 did write some opinions for them, and now we can't discover
20 them in this case because they're technically in some other
21 case. None of the cases that Mr. Tolchin have cited go for
22 that proposition. I don't think he can even assert this
23 objection frankly because Rule 34 says if you have objections
24 to a request you have to serve the objections within 30 days

1 and they never did, and that's a waiver of this objection to
2 the extent it was ever a valid objection in the first place.

3 You can look at the cases he cites in his letter.
4 One of them is from 1940, 4-0. And it involves a decision
5 where the district court judge was apparently just learning
6 what the federal rules required. He does say its inconceivable
7 that a lawyer would be required to produce something from
8 another client's file. He also says, though, that it's
9 inconceivable that the defendant would have to produce a prior
10 statement of the plaintiff, which is obviously discoverable
11 under the modern interpretation of the Rule.

12 So I don't think those are good cases. There's no
13 cases from the Second Circuit or from this court that would say
14 that this sort of thing doesn't have to be provided, and
15 frankly I'm troubled at going to a deposition, finding out that
16 the witness has had communications with plaintiff's counsel and
17 I didn't even know about them beforehand. And I acknowledge
18 that I did get a document in the Saperstein [Ph.] case that
19 purported to be from counsel. There was no indication that
20 there had been communications between counsel in that case and
21 the witness. I always suspected they wrote it without talking
22 to the witness. It was only when I got to the witness that I
23 found out that there had been these communications and
24 payments.

25 THE COURT: Okay. What this really comes down to,

1 Mr. Tolchin, is I gather -- you're not saying that there are
2 physically no documents; you're saying that -- you're either
3 saying that the documents are not in your custody and control
4 or that they're not discoverable.

5 MR. TOLCHIN: I'm saying both. I'll lay it all out
6 here. There's a case called Saperstein that was in Florida.
7 That case is dismissed.

8 About two years ago right around the time that Mr.
9 Youseff's book came out plaintiff's Israeli counsel, who
10 happened to also be the Israeli counsel in the Saperstein
11 case -- so it wasn't me, it was the Israeli counsel -- had
12 communication with Mr. Youseff through his literary agent
13 they -- through his publisher. There was discussion about
14 retaining him as an expert. He was paid some money by the
15 Israeli counsel. I believe the sum he testified to was
16 accurate. A report -- I take back the word "report" -- a
17 summary of his opinion was prepared and served on Mr. Hill and
18 his co-counsel. It was not drafted by the witness. It was
19 prepared and shown to the witness after telephone conversation
20 with Israeli counsel. I have asked -- even though we don't
21 think we're obligated to produce any of this from the
22 Saperstein case, I have asked the Israeli counsel if they have
23 any written correspondence of any substance with the -- with
24 Mr. Youseff and -- no, it was all -- it was done -- the
25 preparation of that was done over the telephone. The one

1 document that exists was that summary which was served and Mr.
2 Hill has. So for Mr. Hill to say he didn't know about it is
3 ridiculous and he's kind of acknowledged that in the end that
4 he knew about it.

5 It's of note that -- just to document that this is a
6 bit of crocodile tears, at the deposition of Mr. Youseff, other
7 than establishing the fact that he had served as an expert in
8 the Saperstein case, no questions were asked of him about that.
9 They didn't show him that report that they have in their
10 Saperstein file. They didn't ask him any questions about the
11 opinion he gave. Mr. Hill says he always suspected it was done
12 without talking to him. That wasn't explored other than, did
13 you have communications with -- you know, who spoke to you
14 about it, and he identified the Attorney Lightner [Ph.] that he
15 had conversations with, so that's the history of this.

16 I don't have any documents; my clients don't have any
17 documents. I imagine the one thing I didn't explore is that
18 probably someplace the Lightners have -- the Lightner -- the
19 attorney in Israel has a copy of the check or wire transfer,
20 whatever form of payment was used to pay him. I don't -- I
21 didn't ask him that question but I assume if money was paid
22 they have a record of it. But even that is of little substance
23 because the witness -- Mr. Youseff testified that he got paid
24 and said how much.

25 So I don't think that -- in direct answer to Your

1 Honor's question, I don't think that the Sokolow plaintiffs can
2 be said to have in their possession custody or control
3 documents that their Israeli attorney may have, if any, based
4 on their representation of a different client. And so that's
5 part (a) of Your Honor's question; and (b) even if they had it,
6 even if you could say it was somehow in their control, I don't
7 think it's discoverable because all of that would be within
8 several different privileges of the Israeli counsel and the
9 clients in the other case, work product, for example. But we
10 don't even have to get to that point because you can't force a
11 lawyer to go into his other client's file. Maybe they could
12 subpoena -- they could ask the witness, they could ask Mr.
13 Youseff about it. You --

14 THE COURT: Okay. All right. Counsel --

15 MR. TOLCHIN: -- could ask the other client about it
16 but --

17 THE COURT: -- counsel, again as I said, while --
18 it's always interesting when you're here. Two things. One is,
19 while I -- I do have questions about how plaintiffs' counsel
20 approached this. I'm not sure that the bottom line is that
21 with regard to the claims in this case the documents that
22 were -- either existed or didn't exist, were withheld, weren't
23 withheld, have any particular significance to the claims in
24 this case.

25 MR. HILL: The problem is, Your Honor, I don't know

1 and I, you know, hesitate to say this because I don't yet have
2 the transcript, but when the witness described the work he did
3 it didn't sound to me like the Saperstein case. Mr. Saperstein
4 as Mr. Tolchin and I know from having litigating that case was
5 somebody was shot in the Gaza strip. The witness described a
6 shooting that took place in Jerusalem. This case is about
7 Jerusalem. So I don't know whether -- what the witness was
8 describing was the Saperstein case or not. And I think we
9 properly requested these materials. There was no timely
10 objection be it to lack of custody and control. Mr. Tolchin
11 just mentioned privilege. I don't have a privilege log. I
12 mean there's no timely objection to any production of these
13 materials and they wouldn't be privileged anyway of their
14 communications with an expert witness and between counsel.

15 So I would just ask the Court to order them to be
16 produced. Let's see what we get and we'll go from there, but I
17 don't think it's appropriate at this point for the Court just
18 to say, okay, well, I'm not going to order it, well, because
19 there's no -- Mr. Tolchin just told us he doesn't exactly know
20 what's in the custody of these Israeli lawyers that's called
21 for by a request.

22 THE COURT: What I'm saying though, however, is I'm
23 not getting the feel for what it is that -- I mean, assume that
24 there was a -- are you -- you questioned the expert about this?

1 MR. HILL: I asked him some questions. I didn't have
2 the documents to question him about.

3 THE COURT: Well, I understand but --

4 MR. TOLCHIN: Your Honor, in this case, in this case
5 he was a --

6 MR. HILL: And he may -- he may be here at trial.

7 MR. TOLCHIN: In this case he was named so at least
8 up to now he's a fact witness. He's not -- he was not deposed
9 as an expert witness.

10 THE COURT: Okay. But understand that it's not even
11 a question of whether or not, as I said, things were produced
12 or not produced. I'm still not seeing the tie-in to the claims
13 in this case in terms of its relevance in Rule 26.

14 MR. HILL: Well, they're required -- the witness
15 testified that he wrote a report about an attack in Jerusalem.

16 THE COURT: And --

17 MR. HILL: I'd like to get it. This case is about
18 attacks in Jerusalem. I don't know if it's about this case or
19 not and I appreciate Mr. Tolchin saying it's about another
20 case, but that's not what the witness said.

21 MR. TOLCHIN: I can tell you that the only --

22 THE COURT: Okay. Sorry, sorry --

23 MR. TOLCHIN: -- retention of this expert --

24 THE COURT: Counsel, look. All right. And I

1 understand that you may have been hampered a little but you
2 just can't leave it like that and then tell me you don't know
3 what it's about. You had him there. You don't -- you didn't
4 ask enough questions so that you could --

5 MR. HILL: Well, I don't have the record now. I
6 think -- I think the record establishes that it's not the
7 Saperstein case but I don't have it yet.

8 THE COURT: Right.

9 MR. HILL: So -- I mean, I don't know what to do in
10 terms of --

11 THE COURT: Do you believe the record --

12 MR. HILL: -- do you want me to file a motion once I
13 get it or --

14 THE COURT: Do you believe that the record
15 establishes that notwithstanding the conversation that we're
16 having now about whether or not it should have been produced or
17 not, whether or not it would be relevant under Rule 26, but
18 that we need to explore it further?

19 MR. HILL: Well, I would think any prior statement of
20 a witness or prior engagement of a witness by counsel for the
21 party in the case would be relevant; if nothing else, the
22 witness's bias.

23 THE COURT: Well, that's not relevant to the claim.
24 Now you're talking -- the Rule doesn't require that anymore.

1 And it used to be if it was related to the -- to the subject
2 matter and that included claims about whether or not the
3 person's credibility was involved. I'm asking whether or not
4 it has anything to do with the claims in the case. Now --

5 MR. HILL: I don't know it's the answer because he
6 described the shooting in Jerusalem and those are some of the
7 cases that are before Your Honor in this case. I don't know
8 whether it's this case or not.

9 THE COURT: Okay. Well, for now we'll be adjourned.

10 MR. HILL: Thank you, Your Honor.

11 THE COURT: Let me -- Michael, sometime in March.

12 COURT CLERK: March 20th at 10:00 a.m.

13 MR. TOLCHIN: What day of the week is that?

14 COURT CLERK: Tuesday.

15 MR. HILL: Your Honor, I don't think that is my
16 spring break, but if it is I will let the Court be advised of
17 my plans.

18 THE COURT: Yes. As long as you don't wait until 48
19 hours before the --

20 MR. HILL: Oh, certainly. I'll know as soon as I get
21 back to my phone.

22 THE COURT: As soon as you get back to the office.

23 MR. HILL: Yeah.

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1 I certify that the foregoing is a court transcript from an
2 electronic sound recording of the proceedings in the above-
3 entitled matter.

4
5 _____
6 Ruth Ann Hager, C.E.T.**D-641

7 Dated: January 24, 2012
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